

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 119

APRIL 1971

No. 5

THE DUE PROCESS REVOLUTION AND CONFRONTATION *

ERWIN N. GRISWOLD †

Our law has changed a good deal in recent decades. I am not thinking of the many statutes passed in those years. Nor am I referring to the hundreds of Supreme Court decisions handed down in the past quarter century. I am referring to the Constitution. This may appear strange in view of the fact that there have been only four amendments to the Constitution in the past thirty-seven years, and those deal with rather specific matters such as the term and disability of the President, electors for the District of Columbia, and abolition of the poll tax. Yet it can be said, I think, that there has been a constitutional revolution in the past twenty years—or at least that we are in the midst of a constitutional revolution. It can also be said, I think, that the results have often been good—depending, of course, on one's standards of goodness in such matters. It is hard to articulate the intellectual bases for this revolution. Like the Court's power to declare acts of Congress unconstitutional, it may rest, in the last analysis, largely on fiat.¹ From this it may follow that the revolution

*This Article is based on the Owen J. Roberts Memorial Lecture, delivered February 4, 1971, under the auspices of the Pennsylvania Chapter of the Order of the Coif, the Law Alumni Society, and the University of Pennsylvania Law School.

In preparing this Article, I have drawn freely on two briefs filed by the United States as amicus curiae in *California v. Green*, 399 U.S. 149 (1970). I acknowledge the work of associates in the Department of Justice in the preparation of these briefs, notably Beatrice Rosenberg and Roger A. Pauley of the Criminal Division, Appellate Section, and Jerome M. Feit and Peter L. Strauss of the Solicitor General's Office. Needless to say, the responsibility for this Article is wholly mine, and nothing in it represents the official view of the United States or the Department of Justice.

† Solicitor General of the United States. A.B., A.M. 1925, Oberlin College; L.L.B. 1928, S.J.D. 1929, Harvard University. Dean, 1946-67, Harvard Law School.

will always be in process, subject to qualification and reevaluation in changing times and circumstances. The heart of the revolution is found in the fourteenth amendment, a rather general provision whose historical origin is well known. It prevents, in terms, the states from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws.

The "due process" provision of the fourteenth amendment has been used, in one way or another, to make applicable to the states many or most—but not yet all—of the much more specific provisions of the Bill of Rights, which are applicable of their own force only to the federal government. One by one the specific guarantees of the Bill of Rights have been held applicable to the states—freedom of the press and of religion found in the first amendment, protection against unreasonable searches and seizures guaranteed by the fourth amendment, the right to jury trial, the right to counsel in criminal cases, and the privilege against self-incrimination provided by the sixth amendment, and the prohibition against cruel and unusual punishments contained in the eighth amendment, among others.

I do not propose to reexamine all of these conclusions or to try to elucidate how they came about. Rather, I am going to focus on a very specific instance of the revolution, trace its development, and show some of the problems which have arisen while the Court was proceeding down this road. At the end of my discussion, there may be room for some general observations about the process of constitutional interpretation.

The instance I refer to involves the confrontation clause of the sixth amendment which provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him

This right is said to find its historical origin in the trial of Sir Walter Raleigh.² It brings to mind pictures of trial by affidavit, condemnation by faceless witnesses, and proof of guilt by mere recital of charges. There can be little doubt that extreme instances of conviction without confrontation would be within any fair concept of the denial of life, liberty, or property without due process of law, which is forbidden to the states by the fourteenth amendment. Until a few

¹ As Justice Jackson said in *Brown v. Allen*, 344 U.S. 443, 540 (1953): "We are not final because we are infallible, but we are infallible only because we are final." See also Henkin, Book Review, 70 COLUM. L. REV. 1494, 1500 (1970).

² See F. HELLER, *THE SIXTH AMENDMENT* 104 (1951); 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 333-36 (1883).

years ago, however, the sixth amendment itself was specifically held inapplicable to the states.³ Not until April, 1965, did the Court hold in *Pointer v. Texas*⁴ that

the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.⁵

Since that time there have been a number of decisions exploring the right to confrontation, and a number of problems have been disclosed. To deal with those decisions and problems, some background is necessary, chiefly in the application of the sixth amendment to the federal government, as was contemplated when it was adopted.

I. EARLY INTERPRETATIONS OF THE CONFRONTATION CLAUSE

If the confrontation provision were read literally, it would allow testimonial evidence to be presented only through witnesses present in court. This would exclude all hearsay evidence. But it was long ago held that this was not the intended effect of the confrontation clause. For light on this matter we are greatly indebted to one Clyde Mattox, who, in 1889, was charged with murdering John Mullen in the Indian Territory. At Mattox's trial, the attending physician testified that he had advised Mullen that he could not survive. The physician had asked Mullen who had shot him, and Mullen responded he did not know.⁶ Defense counsel then endeavored to elicit from the witness whether Mullen also had responded that Mattox was not involved. The physician was not allowed to answer, on the ground that the statement was hearsay and thus inadmissible.

Mattox was convicted but the Supreme Court reversed the judgment on several grounds, one of which was that the dying declaration should have been received in evidence.⁷ The Court made no reference to the confrontation clause, because, I suppose, the evidence offered in this case was not *against* the accused.

Following this decision, Mattox was retried on the murder charge. At the second trial, it developed that two principal witnesses for the government at the first trial had died. Both had testified at the first

³ See *Stein v. New York*, 346 U.S. 156, 195-96 (1953); *West v. Louisiana*, 194 U.S. 258, 264 (1904). See also *Baker v. Utecht*, 161 F.2d 304 (8th Cir.), *cert. denied*, 332 U.S. 831 (1947); *Kelley v. People*, 120 Colo. 1, 206 P.2d 337, *cert. denied*, 338 U.S. 880 (1949).

⁴ 380 U.S. 400 (1965).

⁵ *Id.* at 403.

⁶ *Mattox v. United States*, 146 U.S. 140, 141-42 (1892).

⁷ *Id.* at 152.

trial and had been subjected to cross-examination. At the second trial, the reporter's notes of their previous testimony were admitted in evidence, and "constituted the strongest proof against the accused."⁸ Mattox was again convicted. This time the Supreme Court affirmed his conviction with full consideration of the confrontation clause:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.⁹

Thus it became apparent that the confrontation clause could not be read literally. Rather, it was to be interpreted in light of the law as it existed at the time of the adoption of the sixth amendment, and that law recognized exceptions to the hearsay rule. The confrontation clause had a purpose, clearly, but it was not designed to freeze the law of evidence or to exclude all hearsay evidence.

The Court again considered the confrontation clause in *Salinger v. United States*.¹⁰ *Salinger* was an appeal from a conviction for using the mails to defraud. At trial, certain letters, bank-deposit slips, and book entries were admitted as evidence against the accused. In each instance, the state produced other evidence of the accused's con-

⁸ *Mattox v. United States*, 156 U.S. 237, 240 (1895).

⁹ *Id.* at 242-43.

¹⁰ 272 U.S. 542 (1926).

duct which brought him into such relation to the items offered "as to make them admissible in connection with that evidence."¹¹ The Court held the letters, bank-deposit slips, and book entries admissible. In so doing, it reaffirmed that the confrontation clause was not meant to rework the rules of evidence. Rather, its purpose was to "continue and preserve [the] right [of confrontation], and not to broaden it or disturb the exceptions."¹²

II. MODERN DEVELOPMENTS: INCORPORATION; FUSION OF CONFRONTATION AND CROSS-EXAMINATION

With these cases as background, we now come to more modern developments.¹³ I have already referred to the decision in *Pointer v. Texas*. That case involved a prosecution in a Texas state court. After petitioner's arrest on a robbery charge, he was brought before a state judge for a preliminary hearing at which the complaining witness testified. The petitioner had no counsel at the hearing, and, although he was entitled to cross-examine the complaining witness, he did not do so. Thereafter, the petitioner was indicted and brought to trial. Before trial, however, the complaining witness moved to California. The state introduced evidence to show that the witness had moved and did not intend to return to Texas. The state then offered the transcript of the witness' testimony at the preliminary hearing as affirmative evidence against the petitioner. Petitioner now had counsel who objected to the introduction of the transcript on the ground that it was a denial of the right to confrontation. This objection was overruled, and the Texas Court of Criminal Appeals affirmed petitioner's conviction.

The Supreme Court granted certiorari and held that the sixth amendment right to confrontation is "a fundamental right and is made obligatory on the States by the Fourteenth Amendment."¹⁴ There is much to be said for the result. My concern here is with the reason, for the Court analogized the right of confrontation to the right of cross-examination:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an

¹¹ *Id.* at 547.

¹² *Id.* at 548.

¹³ For other discussions of the problem, see Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965); Comment, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966). See also 5 J. WIGMORE, EVIDENCE §1397 (3d ed. 1940); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

¹⁴ 380 U.S. at 403.

accused in a criminal case to confront the witnesses against him.¹⁵

Noting that its decisions had constantly emphasized the necessity of cross-examination as a protection for defendants in criminal cases, the Court continued:

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.¹⁶

Later in the opinion, the Court again spoke of confrontation and cross-examination together when it said "the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case,"¹⁷ and added that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."¹⁸ The Court recognized the *Mattox* cases but stated: "Nothing we hold here is to the contrary."¹⁹ Finally, the Court recognized that:

The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine.²⁰

Justices Harlan and Stewart concurred in the result, on the ground that it was required by the fourteenth amendment in the circumstances of the case.

On the same day, the Court decided *Douglas v. Alabama*.²¹ Petitioner and an alleged accomplice (Loyd) were tried separately in an Alabama state court for assault with intent to murder. The state called the accomplice as a witness at petitioner's trial, but he repeatedly refused to testify on the ground of self-incrimination. The prosecutor,

¹⁵ *Id.* at 404.

¹⁶ *Id.* at 405.

¹⁷ *Id.* at 406.

¹⁸ *Id.* at 406-07.

¹⁹ *Id.* at 407.

²⁰ *Id.*

²¹ 380 U.S. 415 (1965).

over the petitioner's objection and despite the accomplice's refusal to answer, read in the presence of the jury a purported confession by the accomplice implicating the petitioner. This was done on the asserted basis of refreshing the witness' recollection. Three law enforcement officers then identified the document as the confession signed by the accomplice, but the document itself was not offered in evidence. The petitioner was found guilty and the state appellate court affirmed his conviction.

The Supreme Court reversed in an opinion written by Justice Brennan. He began his discussion of the law by saying:

Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation.²²

On the latter point he cited the second *Mattox* decision. Justice Brennan concluded that under the circumstances Douglas' inability to cross-examine Loyd as to the alleged confession denied him the right of cross-examination secured by the confrontation clause.²³ The mere fact that there was opportunity to cross-examine the police officers was not "adequate to redress this denial of [an] essential right,"²⁴ because they could testify only to the fact that Loyd made the confession. Cross-examination of the police on the question of the genuineness of the confession "could not substitute for cross-examination of Loyd to test the truth of the statement itself."²⁵ Again, Justices Harlan and Stewart concurred in the result.

In these two cases, the Court drew a strong parallel between the right guarded by the confrontation clause and the right of cross-examination—the latter of which is not expressly protected by any constitutional provision. The Court recognized an exception to this parallel in the case of prior testimony when there had been a full opportunity to cross-examine (the second *Mattox* case) and there was a somewhat begrudging recognition of the admissibility of dying declarations (the first *Mattox* case).

If confrontation means cross-examination, however, all testimonial evidence must be produced through live witnesses who are subject to cross-examination as to the truth of their testimony. This would mean either that the hearsay rule is absolute, or that certain limited exceptions, hallowed by time, are frozen into the Constitution and are not

²² *Id.* at 418.

²³ *Id.* at 419.

²⁴ *Id.* at 420.

²⁵ *Id.*

subject to change, development, or experimentation by either the states or the federal government. For some years academic writers in the field of evidence have considered the hearsay rule an obstacle to the development of truth. These writers suggest we expand the exceptions to the hearsay rule and allow the trier of fact to weigh all relevant evidence.²⁶ The fact that certain evidence was hearsay would, of course, be taken into account in evaluating the evidence, but would not render it inadmissible. If cross-examination and confrontation are equivalent, though, any such development would be impossible—short of a constitutional amendment—not only in federal courts, but also, since the *Pointer* decision, in state courts. Thus, one consequence of *Pointer* might be to freeze the hearsay rule into the Constitution, setting up a fixed national standard on this question, and making impossible any development or experimentation by the states in this area.

Three years after *Pointer*, the Supreme Court decided *Barber v. Page*.²⁷ Barber and one Woods were jointly charged with armed robbery. At a preliminary hearing, Woods waived his privilege against self-incrimination and testified, incriminating Barber. Barber's counsel did not cross-examine Woods. Seven months later, when Barber was brought to trial in Oklahoma, Woods was in a federal prison in Texas. The state made no effort to secure Woods' presence at the trial, but introduced the transcript of his testimony at the preliminary hearing. Notwithstanding his objection that this deprived him of his right of confrontation, Barber was convicted, and his conviction was affirmed by the highest state court in 1963.

Some years later, Barber sought, but was denied, federal habeas corpus relief. The Supreme Court granted certiorari and reversed these decisions in an opinion written by Justice Marshall. Referring to, but holding inapplicable, the second *Mattox* decision, he noted that Oklahoma had made no effort to obtain Woods' presence at the trial and that it was insufficient merely to show his absence from the juris-

²⁶ See V. J. WIGMORE, EVIDENCE §1427 (3d ed. 1940); PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 8-03 (Preliminary Draft) (Advisory Committee's Note), in 46 F.R.D. 161, 351 (1969). For support of a narrower extension of admissibility, to prior statements of persons presently available for cross-examination, see UNIFORM RULES OF EVIDENCE rule 63(1) (1953); MODEL CODE OF EVIDENCE rule 503(b) (1942); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A.L. REV. 43, 48-55 (1954); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573 (1947); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 195 (1948); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 333 (1961). See also *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir.) (L. Hand, J.), cert. denied, 268 U.S. 706 (1925); *United States v. DeSisto*, 329 F.2d 929, 933-34 (2d Cir.) (Friendly, J.), cert. denied, 377 U.S. 979 (1964).

²⁷ 390 U.S. 719 (1968).

tion. Justice Marshall warned that "[t]he right of confrontation may not be dispensed with so lightly."²⁸ But, he continued:

The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. . . . While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.²⁹

Justice Harlan wrote a short, separate concurrence, relying on the due process clause.

III. STATE HEARSAY RULES AND THE RIGHT TO CONFRONTATION

A full examination of the present problem requires mention of two recent cases, both of which involve the California statutory provision that evidence of prior inconsistent statements may be admitted as affirmative proof of guilt.³⁰ In *People v. Johnson*,³¹ the defendant was charged with incest. The indictment was based on evidence given by his wife and his daughter before the grand jury, when the defendant was not present, and without any cross-examination. The grand jury returned an indictment, and the defendant pled guilty. Some time thereafter, however, his plea was set aside on the ground that the defendant had not had proper counsel. At the resulting trial, however, the wife and daughter recanted, flatly denying that criminal acts had been committed. The prosecutor then read to the jury the relevant portions of the transcript of the testimony given by the two witnesses before the grand jury. The trial court, pursuant to the California statutory provisions, had charged the jury that they should consider this prior testimony "in the same light and in accordance with the same rules which you have been given as to testimony of witnesses who have testified here in court."³² The defendant had been convicted.

In the California Supreme Court, the defendant contended that the use of these prior inconsistent statements as substantive evidence of guilt operated to deprive him of his sixth amendment right of con-

²⁸ *Id.* at 725.

²⁹ *Id.* at 725-26.

³⁰ CAL. EVID. CODE §§ 770, 1235 (West 1966).

³¹ 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969).

³² *Id.* at 651, 441 P.2d at 115, 68 Cal. Rptr. at 603.

frontation. The state argued that because the two witnesses were in court and subject to cross-examination, their testimony and demeanor could be seen and evaluated by the jury, and therefore their prior testimony could be impeached by the evidence they gave at trial.

The California court held that the use of the prior testimony as affirmative evidence, when it was not subject to cross-examination at the time it was given, denied Johnson his right of confrontation and reversed the conviction. The Supreme Court denied the state's petition for certiorari.

The second California case eventually came before the Supreme Court as *California v. Green*.³³ One Porter was the principal witness at the defendant's trial for furnishing narcotics to a minor. He testified, however, that he did not recall whether it was the defendant who had given him the narcotics. The state then offered evidence of two prior statements made by Porter. The first was Porter's testimony at a preliminary hearing, under oath and subject to cross-examination, that the defendant had been his supplier. At the trial, Porter said that he did not remember his testimony at the preliminary hearing, but that he had testified, and that he believed his statements at the hearing were the truth as he then believed it. On cross-examination, he said that he had no recollection of the events covered by his testimony.

The second statement offered at the trial pertained to a conversation between Porter and a police officer named Wade. This was neither under oath nor subject to cross-examination. Wade testified that Porter had told him the defendant was the supplier of narcotics. When Porter was recalled he admitted having talked to Wade, and said that he might have told Wade about the defendant, that he believed he was telling the truth at that time, but that he had no recollection of any of these events.

Both prior statements were admitted in evidence, pursuant to the California statute, as part of the prosecution's affirmative proof of guilt. They were, indeed, the only direct proof that the defendant was the person who had supplied the narcotics.

On appeal to the California Supreme Court, the state conceded that the *Johnson* decision covered the police officer's testimony, since the prior statement was not under oath or subject to cross-examination, but it urged that that error was harmless. The principal question at issue in the California court was the admissibility of Porter's state-

³³ 399 U.S. 149 (1970). The case is discussed in Kurland, *Enter the Burger Court: The Constitutional Business of the Supreme Court, October Term 1969*, 1970 SUP. CT. REV. 1, 38-43, and in *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 108-17 (1970).

ment at the preliminary hearing, which was made under oath and subject to cross-examination. The state court held that the use of this evidence, too, was barred by the confrontation clause.³⁴

Again the California authorities sought review in the Supreme Court of the United States, and this time certiorari was granted. The United States, through the Solicitor General's office, filed a brief as amicus curiae, and participated in the oral argument. It recognized that no federal statute renders witnesses' prior inconsistent statements admissible to prove the truth of their content, and that all federal circuits, with one exception,³⁵ follow the rule that such prior statements are admissible only for purposes of impeachment. It suggested, however, that the United States had an important interest in preserving Congress' power to modify these rules in the future. The amicus observed that:

If the Confrontation Clause of the Sixth Amendment to the Constitution renders the California statute in this case unconstitutional, the ability of Congress and State legislatures (and courts) to modify rules of evidence in criminal trials, particularly with respect to hearsay, appears to be highly limited.³⁶

Reference was made to the *Proposed Rules of Evidence for the United States District Courts and Magistrates*, promulgated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Among the Committee's recommendations was a provision making any prior inconsistent statement of a witness admissible as affirmative evidence.³⁷ This provision is virtually identical with the California statutory provision.

The Supreme Court, in an opinion by Justice White, held the evidence given at the preliminary examination admissible at trial as affirmative evidence against the defendant.³⁸ Justice White enunciated a rather different view of the relation between confrontation and cross-examination than had been developed by the Court in the *Pointer* case:

The issue before us is . . . whether a defendant's constitutional right "to be confronted with the witnesses against him" is necessarily inconsistent with a State's decision to change its

³⁴ *People v. Green*, 70 Cal. 2d 654, 665, 451 P.2d 422, 429, 75 Cal. Rptr. 782, 784 (1969).

³⁵ The Second Circuit is the exception. See *United States v. DeSisto*, 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964).

³⁶ Brief for the United States as Amicus Curiae at 3, *California v. Green*, 399 U.S. 149 (1970).

³⁷ PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES rule 8-01(c)(2)(i) (Preliminary Draft), in 46 F.R.D. 161, 331 (1969). The rule excludes such prior inconsistent statements from the definition of hearsay.

³⁸ 399 U.S. at 164-65.

hearsay rules to reflect the minority view described above. While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.³⁹

Justice White then pointed out that the witness Porter was present at the trial, and observed that "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause" ⁴⁰ He added:

Viewed historically . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.⁴¹

The Court's reasoning was applicable to both prior statements, the one which was made under oath and subject to cross-examination, and the one which was not.⁴² Therefore, no easy distinction between the two statements could be drawn based upon prior opportunity for cross-examination:

We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement.⁴³

[N]either evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.⁴⁴

Since Porter's testimony at the preliminary hearing had been subject to cross-examination, the Court held it admissible despite the fact that in his trial testimony he said he could not remember the previous events. The Court remanded the question of Porter's statement to the police officer to the California courts, so that they might decide "[w]hether Porter's apparent lapse of memory so affected [the defendant's] right to cross-examine as to make a critical difference in the application of the Confrontation Clause" ⁴⁵

³⁹ *Id.* at 155.

⁴⁰ *Id.* at 157.

⁴¹ *Id.* at 158.

⁴² *See id.* at 159.

⁴³ *Id.*

⁴⁴ *Id.* at 161 (footnote omitted).

⁴⁵ *Id.* at 168.

Justice Blackmun took no part in the decision. Chief Justice Burger and Justice Harlan wrote concurring opinions. The Chief Justice emphasized "the importance of allowing the States to experiment and innovate, especially in the area of criminal justice."⁴⁶ Justice Harlan focused his opinion on what he referred to as "an understandable misconception . . . of numerous decisions of this Court, old and recent, that have indiscriminately equated 'confrontation' with 'cross-examination.'"⁴⁷ He concluded that "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial."⁴⁸ He found this to be true both under the sixth amendment and under the due process clause of the fourteenth amendment. He added:

By incorporating into the Fourteenth Amendment its [*sic*] misinterpretation of the Sixth Amendment these decisions have in one blow created the present dilemma, that of bringing about a potential for a constitutional rule of hearsay for both state and federal courts. However ill-advised would be the constitutionalization of hearsay rules in federal courts, the undesirability of imposing those brittle rules on the States is manifest.⁴⁹

Mr. Justice Brennan dissented, finding no distinction "between a witness who fails to testify about an alleged offense because he is unwilling to do so and a witness whose silence is compelled by an inability to remember."⁵⁰ In neither instance, he said, "are the purposes of the Confrontation Clause satisfied, because the witness cannot be questioned at trial concerning the pertinent facts."⁵¹ Referring to the evidence given at the preliminary hearing, which was subject to cross-examination, Justice Brennan remarked: "Cross-examination at the hearing pales beside that which takes place at trial."⁵² In his view, the provisions of the California Evidence Code allowing the admission of prior inconsistent statements as affirmative evidence should be held "in violation of the Confrontation Clause."⁵³

That problems in interpreting the clause continue is exemplified by the most recent Supreme Court decision to interpret the confronta-

⁴⁶ *Id.* at 171.

⁴⁷ *Id.* at 172.

⁴⁸ *Id.* at 174.

⁴⁹ *Id.* at 184.

⁵⁰ *Id.* at 194.

⁵¹ *Id.*

⁵² *Id.* at 197.

⁵³ *Id.* at 203.

tion clause, *Dutton v. Evans*.⁵⁴ This was a murder case, which began in a Georgia state court. At defendant's trial, there were numerous prosecution witnesses, some of whom gave eye witness testimony of the crime. One witness, Shaw, testified concerning a statement made to him by Williams, one of the alleged accomplices in the crime. Shaw, who had been Williams' fellow prisoner, testified that when Williams returned to prison after his arraignment on the murder charge, Williams said that if it were not for the defendant "'we wouldn't be in this now.'" ⁵⁵ Defense counsel objected to Shaw's evidence on the ground that it was hearsay. The Georgia Supreme Court held the evidence admissible under a Georgia statute ⁵⁶ which, as construed by the Georgia courts, allows the admission of statements made by a co-conspirator after the conspiracy has terminated, and even after the co-conspirator has been arrested. In this case, the statement was made some fifteen months after the crime.

The Supreme Court thus faced a considerable extension of an exception to the hearsay rule, authorized by a rather venerable state statute as construed by the state court. Williams' statement was not given under oath, nor was it subject to cross-examination when made. The problem presented goes beyond that in *California v. Green*, since Williams could not have been expected to testify at trial, due to his probable reliance on the privilege against self-incrimination. The jury would therefore have been unable to view the witness and there would be no opportunity for cross-examination.

The extreme difficulty of the case is evidenced by the lack of agreement among the Justices. The Court decided that the admission of the evidence did not violate the confrontation clause. Justice Stewart announced the judgment of the Court in an opinion in which the Chief Justice and Justices White and Blackmun concurred. Justice Harlan filed an opinion concurring in the result. Joining in an opinion written by Justice Marshall, four members of the Court dissented. Thus, I think it may fairly be said that although the result was 5 to 4, the decision was about 4.6 to 4.4. Justice Harlan's difficulty with the problem is apparent from his observation that, as a result of his consideration of the *Evans* case, he was no longer "content with the position" he took in his concurring opinion in *California v. Green*, decided only six months previously.

In *Dutton*, Justice Stewart said: "[T]his Court has never indicated that the limited contours of the hearsay exception in federal

⁵⁴ 400 U.S. 74 (1970).

⁵⁵ *Id.* at 77.

⁵⁶ GA. CODE ANN. § 38-306 (1954).

conspiracy trials are required by the Sixth Amendment's Confrontation Clause."⁵⁷ Just how this squares with the Court's language in *Pointer v. Texas* is not clear. At any rate, we have, six years after *Pointer v. Texas*, a decision holding that hearsay evidence may be admissible even though there was no cross-examination when the statement was made, and the declarant did not appear at trial, and thus was never subject to cross-examination. The marriage of cross-examination and confrontation which was certified in 1965 found its way, by a very difficult path, to at least a limited divorce in 1970. But though the concepts are no longer merged, they surely have much in common. Just how is the line between them to be drawn?

Certainly there are constitutional limits on the use of hearsay evidence, even though the confrontation clause cannot be taken literally. Suppose two men are charged with a crime, but are tried separately. At the trial of one, evidence is offered through a third person that the other has given a confession in which he maintains that the first defendant committed the crime and related to him the story of the crime in considerable detail. Surely this would not be admissible. It is precisely the evil that the confrontation clause was designed to prevent, and seems equally obnoxious to the due process clause. This is, after all, essentially what was decided in *Douglas v. Alabama*.⁵⁸ On the other hand, how is it different from *Dutton v. Evans*? Only in degree, I suppose—but the distinction is not the worse for that. The evidence involved in *Dutton v. Evans* was not the whole story. It was but a small part of the picture, and it had certain earmarks of truth in that it was spontaneous and against interest.

It is clear now that some kinds of hearsay are admissible despite the confrontation clause: for example, dying declarations and prior recorded testimony when the witness is dead or when he is currently present and subject to cross-examination. In addition, book entries are apparently admissible as exceptions to the hearsay rule, and this may be important in such cases as prosecutions for mail fraud or for violations of the securities laws. It also appears, from *Dutton v. Evans*, that the hearsay rule is not frozen, and that certain extensions of it may be upheld despite the confrontation clause.

Let us suppose, though, that a state, moved by a desire to make available all relevant evidence, repeals the hearsay rule. This may seem a little startling to us. But it should not be forgotten that acceptance of hearsay is the norm in nearly all countries of the world,

⁵⁷ 400 U.S. at 82. Later in his opinion Justice Stewart, referring to the confrontation clause and the hearsay evidence rules, said: "[T]his Court has never equated the two, and we decline to do so now." *Id.* at 86.

⁵⁸ See also *Bruton v. United States*, 391 U.S. 123 (1968).

except those which follow the common law system. The hearsay rule is unknown in most parts of the world, and it mystifies many of our legal visitors. It seems clear, though, that the application of such an enactment to its full extent would violate the confrontation clause. It would allow the admission into evidence of any extra-judicial statement, without any possibility of cross-examination, even though the statement was by no means slight or incidental, and even though it had no earmark of truth.

Suppose no live witnesses testify at all. One might think that impossible in a criminal trial, but such a case came across my desk not long ago. *United States v. Lloyd*⁵⁹ was a criminal prosecution under the Selective Service Act. At defendant's trial for refusal to report for induction, "[t]he only evidence offered by the government was a certified and authenticated copy of Lloyd's Selective Service file. No witness testified for the government."⁶⁰ The court held that this was sufficient to support a conviction. At first this bothered me, but I have now been able to rationalize the court's decision. What it means, I think, is that the introduction of this evidence is sufficient to shift the burden of going forward. The burden of proof is on the Government, and stays on the Government; but if the defendant wants to attack the record he must take steps to do so. This does not mean that he must give up his privilege against self-incrimination. He can, for example, call the clerk of the draft board, or members of the board, and attempt to prove that the record is not accurate. Or he can introduce other evidence, such as copies of his own letters sent to the draft board, which do not appear in his file, and which show that the board did not give adequate consideration to his case or did not accord to him a right required by the law or regulations. I do not think it shocking that, in the absence of any sort of attack, the record is sufficient to prove whatever it shows. It would surely be better practice, however, to have such a record introduced by a live witness, who can testify to the way the records have been kept and can support their accuracy and completeness.

IV. CONFRONTATION AS A CHALLENGE TO JUDICIAL CRAFTSMANSHIP

Before leaving *Dutton v. Evans*, I should refer to the distinction it received—unusual for complicated Supreme Court decisions—of being the subject of the opening article in the *New Yorker* of January

⁵⁹ 431 F.2d 160 (9th Cir. 1970).

⁶⁰ *Id.* at 163.

2, 1971. The article gives *Dutton v. Evans* rather sweeping importance by saying that it

demonstrated that President Nixon has reversed the course that the Warren Court had taken for some fifteen years—that he has switched the five-to-four positive majority under Chief Justice Earl Warren to a five-to-four negative majority under Chief Justice Warren E. Burger.⁶¹

The article continues with the observation that the prevailing Justices in *Dutton v. Evans* are “innovative” because they did not regard the Supreme Court’s 1965 decision in *Pointer v. Texas* as binding in all cases of hearsay. The author then remarks:

But the newcomers innovate with a difference, for where the Warren Court’s most controversial rulings merely stated that defendants in criminal actions had long been denied their ordinary Constitutional rights, the Burger Court has gone back to the old system of tacitly approving that denial.⁶²

The article proceeds in this despairing vein, arguing that

[p]art of the endless struggle to establish justice has been the attempt to establish it uniformly. Indisputably, Georgia justice is different from Maine justice or Nebraska justice; indisputably, it should not be.⁶³

But is this wholly clear? Is there only one way to administer justice? Is there one system which leads to the truth more surely than any other? Have the evidence professors been wrong in saying that the hearsay rule often excludes relevant and reliable evidence? Is there anything in the Constitution which fairly prevents the use of some hearsay evidence? Should there not be continued room for experimentation in the several states in the quest for justice? Is there any reason why procedures in all of the states should be frozen into precisely the same mold? Are we not still a federated nation, and is there not merit in diversity? Is all wisdom and justice centralized in Washington?⁶⁴

This, I suggest, is the real significance of *Dutton v. Evans*. It is basically a decision in the realm of constitutional method, and specifically in the area of federal-state relationships. It may fairly be said that there is more chance of achieving justice through *Dutton v.*

⁶¹ NEW YORKER, Jan. 2, 1971, at 15.

⁶² *Id.* 16.

⁶³ *Id.*

⁶⁴ Cf. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

Evans than through a decision which would have solidified the law of evidence in all the states into a federal mold. Viewed in this broader light, there is nothing in *Dutton v. Evans* which justifies the *New Yorker* editorial writer's gloom.

Of course, we would not have encountered these problems if the sixth amendment had not been held applicable to the states. Without encountering too many difficulties, we got along without that application for 174 years, until the *Pointer* case was decided in 1965. If there were real problems, perhaps they could have been resolved by a thoughtful application of the due process clause of the fourteenth amendment, which is fully applicable to the states.

But, it is said, the due process clause is vague and leaves much to the choice of the judges; and this is unsound, and undemocratic, and consigns us to the whim of men, who ought rather to be bound by the specific text of the Bill of Rights. The fourteenth amendment, however, does not expressly make the sixth amendment applicable to the states, and to leap from the fourteenth amendment to the sixth may be a much more sweeping application of free human choice than the construction and application of the due process clause. Beyond that is the fact that the seeming clearness of the language of the sixth amendment is, alas, illusory.

Our experience with the sixth amendment has taught us that it does not mean what it says. Despite the constitutional provision, it is not the applicable law that the accused is entitled in all circumstances to confront the witnesses against him. Like all good constitutional provisions, the crisp language of the confrontation clause turns out to be somewhat cryptic. It requires thoughtful consideration and application in the light of its historical origins and the general approach of the common law to evidence problems. Just as "no law" in the first amendment cannot literally mean "no law," "confront the witnesses against him" cannot literally mean confrontation in all circumstances. Just what it does mean is filled with problems. We have judges to resolve such questions as they are presented in particular cases. The task of the judges must be accepted and carried out with thought, and, in the last analysis, judgment. It cannot be done by rote, and to think that such a task can be performed when courts are tied down firmly to a text is, at best, an illusion.

This illustrates an aspect of the task of judging which is inescapable and timeless. We have this record of an interchange in the courts of England more than six hundred years ago:

R. Thorpe (counsel): You will do as others in the same case, otherwise we shall not know what the law is.

Hillary (J.) : [Law is] volunte de Justices.

Stonore (J.) : Nanyl; ley est resoun.⁶⁵

It is clear, and should be recognized, that law as developed by judges consists of both aspects. To a very large extent, law is reason. Judges act professionally. They use the materials of the law, and they use them logically and thoughtfully, in the way sanctioned by an external standard, which we call the law. They are not free to go on frolics of their own, or to decide according to their free choice or whim. But, recognizing this, it is still true that in many cases that come before appellate courts, the law, in those professional terms, does not provide a clear answer. At this point the judge must make a choice, albeit usually a narrow one. And when this is done, in constitutional law as well as elsewhere, law becomes the will of the judges.

It is important to understand and accept the fact that there is nothing illegitimate or evil in this process. The process of reasoning involved in judicial decisionmaking requires careful training and high ability. It is largely a matter of the intellect. The process of choice involved in many judicial decisions requires character, breadth of vision, outlook, and wisdom. It is, to a considerable extent, a matter of the spirit. This combination of intellect and spirit in people like Holmes, Brandeis, Hughes, Cardozo, Stone, Roberts, Hand, Frankfurter, and Jackson has given us our greatest judges. These men adhered to the rationality of the law. They recognized that texts and precedents are of great significance and are often binding on the judge. But they recognized, too, that texts and precedents are not always as clear as they may seem.

It is here that the process of judging rises to its highest level. It is not a matter of strict construction or of loose construction. In dealing with the problem of the right of confrontation in state courts, it takes a very loose construction of the fourteenth amendment to bring the sixth amendment into the picture at all. Perhaps it is better, then, to rest the problem directly on the fourteenth amendment, even though its terms are general, trusting in the experienced and informed opinion of the judges.

⁶⁵ See Y. B. Hilary 19 Edw. 3 (1344-45), at 379 (L. Pike ed. & transl. 1905).